DOCKET NO. CV16- 6053880 S	:	SUPERIOR COURT
AFB CONSTRUCTION MANAGEMENT OF TRUMBULL, INC., ET AL	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
TIMOTHY M. HERBST	:	JULY 20, 2017

MEMORANDUM OF DECISION RE: MOTION FOR SUMMARY JUDGMENT NO. 142 AND MOTION TO STRIKE NO. 156

FACTS

The plaintiffs, AFB Construction Management of Trumbull, Inc. (AFB) and Alfonso Barbarotta, filed the revised six count complaint (complaint) in this matter against the defendant, Timothy Herbst, on May 3, 2016.[1] In the complaint, the plaintiffs allege the following facts. AFB is a Connecticut corporation, with Barbarotta as its principal shareholder and executive. AFB is in the business of construction management, facilities management, and energy management, principally on behalf of municipalities and school districts in Connecticut. Specifically, AFB had construction and facilities maintenance contracts with various towns' boards of education in Connecticut, including those of Trumbull, Stamford, West Haven, New

[1] The plaintiffs filed the original complaint on December 10, 2015. On February 16, 2016, the defendant filed a request to revise, to which the plaintiffs filed an objection on March 17, 2016. On March 29, 2016, the defendant filed a reply, and on April 25, 2016, the court, *Bellis, J.*, sustained the objection to the request to revise in part. Subsequently, the revised complaint was filed and is now the operative complaint.

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Haven, and East Haven. The defendant is a private citizen residing in Trumbull and the first selectman of the town of Trumbull.

The complaint further alleges the following. AFB served as a highly regarded construction and facilities manager for various Connecticut municipalities and school districts for almost thirty years. The defendant was elected first selectman of the town of Trumbull in November, 2009. Since the defendant's first days in office, he showed a strong animosity toward AFB and Barbarotta and he embarked on a consistent campaign of attacking the plaintiffs. AFB had business expectancies based on its relationships with the city of Stamford, and the city of Stamford Board of Education. The defendant knew of these business expectancies, and interfered by colluding with Michael Pavia, the mayor of Stamford, in order to ensure that the city of Stamford withdrew a business offer that had been made to AFB. AFB suffered monetary loss as to the value of the contracts, and the defendant's conduct evinced a wilful, wanton, and reckless disregard. The defendant also made numerous statements to newspapers regarding AFB and Barbarotta. The statements were false, attacked the integrity and competence of the business, adversely affected the plaintiffs' business, and were uttered with malice. Count one of the complaint alleges a cause of action for tortious interference with a business expectancy, and counts two, three, four, and six allege causes of action for defamation per se.[2] Further facts will be set forth as relevant.

On March 3, 2017, the defendant filed a motion for summary judgment, accompanied by twenty-two exhibits. The exhibits primarily consist of excerpts from certified copies of

[2] The plaintiffs withdrew count five of the complaint on April 3, 2017, the same date on which they filed their memorandum in opposition to the motion for summary judgment.

deposition transcripts, affidavits, a copy of an ethics complaint, and newspaper articles relevant to the defamation counts. On April 3, 2017, the plaintiffs filed a memorandum in opposition to the motion for summary judgment, accompanied by forty-eight exhibits. The exhibits primarily consist of excerpts from certified copies of deposition transcripts and affidavits. On April 18, 2017, the defendant filed a reply memorandum to the plaintiffs' memorandum in opposition, accompanied by ten exhibits. On April 21, 2017, the plaintiffs filed a motion to strike an affidavit filed with the defendant's reply memorandum as Exhibit CC. The defendant filed an objection to the motion to strike on April 26, 2017. Both motions were heard at short calendar on April 24, 2017.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him

to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 1195 (2015).

"[S]ummary judgment procedure is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 111, 639 A.2d 507 (1994). "[E]ven with respect to questions of motive, intent and good faith, [however], the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact." (Internal quotation marks omitted.) *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 603, 999 A.2d 741 (2010).

RES JUDICATA

The defendant first argues that the plaintiffs' complaint is barred in its entirety by the doctrine of res judicata. Specifically, the defendant argues that the set of facts from which the current action arises is the same as that of a prior lawsuit filed between the same two parties. See *AFB Construction Management of Trumbull, Inc.* v. *Herbst*, Superior Court, judicial district of Fairfield, Docket No. CV-13-6035770-S. The defendant further argues that, if the court does not find that the entire action is barred, then the court should find that the claims arising from the allegedly defamatory statements regarding the snow removal projects and the claims concerning publication of the allegedly defamatory audit report should be barred by the doctrine of res judicata. The plaintiffs counter that the first case was withdrawn, as it resulted in a settlement,

and that there was no final, valid judgment in the prior case, and therefore, that res judicata does not apply. The plaintiffs further argue that even if such a case could result in res judicata, the settlement was narrow and limited solely to the claims that the defendant had interfered with the plaintiffs' contracts with Trumbull Loves Children, Inc. (TLC).

"The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or which might have been made." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600, 922 A.2d 1073 (2007).

"Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156-57, 129 A.3d 677 (2016). "Res judicata bars the relitigation of claims actually made in the action as well as any claims that might have been made there. . . . Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate. . . . Thus, res judicata prevents the reassertion of the same claim regardless of what additional or different evidence or

legal theories might be advanced in support of it." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 157-58.

"A withdrawal is not a determination of the merits of a dispute, or the determination of any sub-issues. A withdrawal does not preclude commencement of a new proceeding raising the same issues. In and of itself, a withdrawal does not even indicate the party who prevailed. . . . By contrast, a stipulated judgment, which does not require formal adjudication by the court, involves court adoption of the parties' agreement as a judgment, implicitly determining the merits .... Such a judgment properly is characterized as a judgment – something that is not applicable to a withdrawal." (Internal quotation marks omitted.) *Lanphier Day Spa, Inc.* v. *Urstadt Biddle Properties, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6029248-S (June 2, 2017, *Povodator, J.*).

The defendant argues that the settlement agreement in the parties' previous case constitutes a final judgment on the merits, and therefore, has preclusive effect on the current matter. In the previous case, however, the plaintiffs filed a withdrawal of action, but there was not a stipulated judgment. The settlement agreement was not filed with the court, nor did it require the court's adoption of the agreement as a judgment. Consequently, the withdrawal in the previous case does not constitute a determination of the merits in dispute. Therefore, the current action is not barred by res judicata.

TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

In the first count, the plaintiffs allege tortious interference with a business expectancy, and allege the following pertinent facts. From about 2003 to 2013, AFB served as the manager of the

city of Stamford's buildings, facilities and park maintenance. In or about April, 2013, the city of Stamford conditionally renewed two three-year maintenance contracts (Stamford contracts), worth approximately $1.1 million, for AFB to continue to manage the city's building, facilities and park maintenance. On or about September 13, 2013, AFB received a letter, notifying AFB that the city of Stamford had decided to withdraw its conditional award of the Stamford contracts.

The complaint further alleges the following. The defendant harbored malice toward the plaintiffs, and "long expressed an intention to 'get' Barbarotta in some fashion." In 2013, the defendant had a publicly established, close relationship with Pavia, the mayor of Stamford between 2009 and 2013. The defendant took advantage of his close relationship with Pavia, and influenced him to take actions to ensure that the plaintiffs' conditionally awarded Stamford contracts were withdrawn. Specifically, the Stamford contracts had already been approved by the Stamford Board of Finance, and awaited only Pavia's signature. After the conditional offer letter was sent, the defendant met with Pavia and other town employees in order to inform them of an ongoing investigation concerning the plaintiffs. The ongoing investigation pertained to an ethics complaint filed by James Henderson, the financial and accounting controls analyst for the town of Trumbull, which falsely asserted that the plaintiffs had committed numerous ethical violations. Specifically, it charged the plaintiffs with failing to disclose their connections with Conveo Energy, one of Barbarotta's businesses, to the Board of Education, with improperly obtaining information to assist Conveo Energy in preparing a proposal, and with improprieties in the management of snow removal projects in 2011 and 2013. The ethics complaint was dismissed

on June 22, 2013, and was not made available to the public. An audit report, which was a near carbon copy of the ethics complaint, was subsequently filed publicly on or about August 15, 2013 by Henderson, at the behest of the defendant. In September, 2013, approximately four months after the meeting between the defendant and Pavia, the conditionally awarded Stamford contracts were withdrawn. The defendant, in his personal capacity, exploited his political connections in order to influence the city of Stamford to withdraw its conditional contracts. The defendant's interference with the business interests of the plaintiffs in the city of Stamford was part of the ongoing campaign that he waged against AFB throughout Connecticut, and resulted in the loss of the plaintiffs' contracts with the city of Stamford.

The defendant argues that there is no genuine issue of material fact that the plaintiffs cannot prove this cause of action. Specifically, the defendant contends that the plaintiffs can prove neither that the defendant's alleged interference resulted in the plaintiffs' loss of the Stamford contracts, nor that the defendant acted maliciously, or intentionally without justification. The plaintiffs counter that there are genuine issues of material fact as to whether the defendant intentionally interfered with the contracts, and whether the defendant was the cause of the plaintiffs' loss of the Stamford contracts.

"[I]n order to recover for a claim of tortious interference with business expectancies, the claimant must plead and prove that: (1) a business relationship existed between the plaintiff and another party; (2) the defendant intentionally interfered with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffered actual loss." (Internal quotation marks omitted.) *Robinson* v. *Robinson*, 103 Conn. App. 69, 77, 927 A.2d 364 (2007). "A cause of action for tortious interference with a business expectancy requires

proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously. . . . It is not essential to such a cause of action that the tort have resulted in an actual breach of contract, since even unenforceable promises, which the parties might voluntarily have performed, are entitled to be sheltered from wrongful interference." (Citations omitted; internal quotation marks omitted.) *Jones* v. *O'Connell*, 189 Conn. 648, 660, 458 A.2d 355 (1983).

"[F]or a plaintiff successfully to prosecute such an action it must prove that the defendant's conduct was in fact tortious. . . . [An] action for intentional interference with business relations . . . requires the plaintiff to plead and prove at least some improper motive or improper means. . . . The plaintiff in a tortious interference claim must demonstrate malice on the part of the defendant, not in the sense of ill will, but intentional interference without justification. . . . In other words, the [plaintiff] bears the burden of alleging and proving lack of justification on the part of the [defendant]." (Internal quotation marks omitted.) *Downes-Patterson Corp.* v. *First National Supermarkets, Inc.*, 64 Conn. App. 417, 429, 780 A.2d 967, cert. denied, 258 Conn. 917, 782 A.2d 1242 (2001). "Stated simply, to substantiate a claim of tortious interference with a business expectancy, there must be evidence that the interference resulted from the defendant's commission of a tort. [A] claim is made out [only] when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. . . . [Not every] act of interference is . . . tortious." (Internal quotation marks omitted.) Id.

In the present case, the parties do not dispute that the plaintiffs and the city of Stamford

had a business relationship, and further, that the defendant shared his concerns about the plaintiffs with individuals who were capable of terminating the Stamford contracts. The issue thus turns on whether the defendant intentionally interfered with the Stamford contracts, while lacking justification and with an improper motive, and whether the defendant's interference resulted in the loss of the Stamford contracts.

A.

Seven factors are to be considered in determining whether the defendant's interference was improper: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." (Internal quotation marks omitted.) *Reyes* v. *Chetta*, 143 Conn. App. 758, 764, 71 A.3d 1255 (2013).

In the present case, the plaintiffs and the defendant disagree as to whether the defendant interfered with the Stamford contracts without justification. First, conflicting evidence has been submitted regarding the nature of the defendant's conduct. The plaintiffs allege that the defendant convinced Henderson to file an ethics complaint against the plaintiffs, and once it was dismissed due to no finding of probable cause, Henderson publicly filed the complaint again in the form of an audit report. The plaintiffs allege that after publication of the audit report, the defendant met with parties that were in charge of determining whether the plaintiffs' contracts with the city of Stamford would be renewed. The parties have submitted conflicting evidence as to whether the defendant shared the audit report at that meeting, and whether the defendant allegedly meeting

with these parties to share details of the report demonstrates malicious intent. See Def.'s Ex. H (deposition testimony of Pavia); Pls.' Ex. 12 (deposition testimony of Barbarotta).

The parties next dispute the defendant's motive in interfering with the plaintiffs' contracts and the interests sought to be advanced through the actions. The defendant argues that there is no evidence that the defendant acted maliciously or intentionally without justification. In support, he offers his own affidavit in which he avers that he did not attend the meeting in Stamford with ill motives or intentions. See Def.'s Ex. O. At his deposition, the defendant testified that the purpose of the meeting was to gather information about services provided by AFB. See Def.'s Ex. N, p. 91. In response, the plaintiffs argue that the motive was animus. In support of this contention, the plaintiffs point to the defendant's deposition and the affidavit of Thomas Kelly, who served as a member of the Trumbull Board of Education. See Pls.' Ex. 4; Pls.' Ex. 6. In Kelly's affidavit, he stated the following: "Mr. Herbst expressed to me or in my presence his personal animosity toward Al Barbarotta" and "Mr. Herbst told us at [the March 2010] meeting that he wanted Mr. Barbarotta 'fired.'" Pls.' Ex. 4. In the defendant's deposition, he testified that he lacked respect for Barbarotta or anything Barbarotta said. Pls.' Ex. 6. Therefore, the parties have presented conflicting evidence as to the defendant's motive in interfering with the contracts.

With regard to the final factors to be considered, the court need not consider them because it has already determined that genuine issues of material fact exists as to the nature of the defendant's conduct and his motives for engaging in any such conduct. Consequently, the plaintiffs have demonstrated a genuine issue of material fact regarding whether the defendant's actions constituted improper interference.

The court notes that the plaintiffs filed a motion to strike the affidavit of Richard Briffault,

which was attached to the defendant's reply memorandum as Exhibit CC. In the affidavit, Briffault discusses the ethics complaint and whether the dismissal of it renders subsequent discussion or publication of the concerns and topics raised therein a violation of the ethics code. The affidavit, therefore, relates to whether the conduct of the defendant was improper. As this court has already determined that genuine issues of material fact exist regarding whether the defendant's actions were improper based on other conflicting evidence, the court need not consider the statements set forth in the affidavit and thus, declines to rule on the motion to strike as it is moot.

B.

The next issue is whether the defendant's alleged interference actually resulted in the loss of the Stamford contracts. The defendant argues that the town decided to cancel the contracts due to financial considerations, while the plaintiffs maintain that it was the defendant's consistent animosity and interference that resulted in the cancellation.

The defendant has presented affidavits of the parties who were involved in the decision to terminate the plaintiffs' contract with the city of Stamford. Mostly notably, the defendant attached the deposition testimony of Pavia, who made the ultimate decision to terminate the contract. See Def.'s Ex. H, p. 72. Pavia testified that a financial analysis had been conducted, after which it was determined that the city could save a substantial amount by moving the facilities maintenance contract in-house. See Def.'s Ex. H, p. 39. He further testified that the decision was not in any way motivated by the defendant, and that he never said as much. See Def.'s Ex. H, p. 51. Finally, Pavia stated that he did not recall reading the audit report, and that any knowledge of such report did not influence his decision-making as it pertained to the contract.

See Def.'s Ex. H, p. 57. The defendant also attached the deposition transcript of Handler, who investigated moving the contract in-house. See Def.'s Ex. I. Handler testified that the two motivations in doing so were "to clean up the reporting structure and . . . operate more efficiently, whether it's the operational efficiency or cost efficiency." See Def.'s Ex. I, p. 43. Handler further testified that nothing happened at his meeting with the defendant that influenced his decision regarding moving the contract in-house. See Def.'s Ex. I, p. 136. Finally, the defendant attached portions of the deposition transcript of Ernest Ortega, a member of Pavia's cabinet, who testified that he participated in discussions on the issue of cost savings as it pertained to bringing the services in-house. See Def.'s Ex. J. He stated that he believed the decision to move the contracts in-house was solely due to cost savings. See Def.'s Ex. J, p. 37. Thus, the defendant submitted evidence that the parties making the decision to withdraw the conditional offer for the Stamford contracts were not influenced by the defendant, and that they made their decision solely due to financial considerations. Therefore, the defendant has met his burden of establishing the absence of a genuine issue of material fact that he did not cause the loss of the plaintiffs' Stamford contracts. As a plaintiff must prove that the defendant's tortious conduct resulted in the actual loss of the business expectancy; see *Golembeski* v. *Metichewan Grange No. 190*, 20 Conn. App. 699, 703, 569 A.2d 1157 (1990) ("stated simply, to substantiate a claim of tortious interference with a business expectancy, there must be evidence that the interference resulted from the defendant's commission of a tort"); the defendant has met his initial burden of showing that the plaintiffs cannot prove a cause of action for tortious interference with a business expectancy. Thus, the burden now shifts to the plaintiffs to show that there is a genuine issue of material fact as to this cause of action. See *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015)

("[o]nce the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue").

The plaintiffs counter that because the defendant was friends with Pavia, he caused the plaintiffs to lose the Stamford contracts. In support of this argument, the plaintiffs point to the meeting between the defendant and Pavia, the defendant and Pavia's relationship, and the contention that the contract only needed Pavia's signature to go forward. The plaintiffs have not provided any evidence, in the form of affidavits or otherwise, however, to show that the decision to move the Stamford contracts in-house had anything to do with the defendant's animus towards the plaintiffs. While the plaintiffs allege in the complaint that "the Mayor and . . . Handler, both essentially admitted to Mr. Barbarotta that the termination had been motivated by political animus, rather than meritorious reasons," both parties denied such allegations, and the plaintiffs have failed to provide evidence to support the allegations. The plaintiffs make conclusory statements regarding the cause of their loss of the Stamford contracts, but they have not supplied evidence to support their contentions. Further, the plaintiffs have not offered evidence to rebut the statements by the parties involved in the decision-making process that the decision was purely based on financial considerations. Therefore, the plaintiffs have not met their burden of showing a genuine issue of material fact as to whether the defendant's actions constituted tortious interference with a business expectancy. Accordingly, as the defendant has successfully established that there is no genuine issue of material fact that the plaintiffs cannot show that the interference resulted in the actual loss, there is no genuine issue of material fact that the plaintiffs cannot prove their claim for tortious interference with a business expectancy. Therefore, the court

grants the defendant's motion for summary judgment as to count one.

DEFAMATION

Counts two, three, four, and six sound in defamation per se. "A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. . . . To establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . . With each publication by the defendant, a new cause of action arises." (Citations omitted; internal quotation marks omitted.) *Cweklinsky* v. *Mobil Chemical Co.*, 267 Conn. 210, 217, 837 A.2d 759 (2004).

"[S]tatements are per se defamatory [if] they [charge] improper conduct or lack of skill or integrity in one's profession or business and [are] of such a nature that [they are] calculated to cause injury to one in his profession or business." (Internal quotation marks omitted.) *Gaudio* v. *Griffin Health Services Corp.*, 249 Conn. 523, 544, 733 A.2d 197 (1999). "Slander is oral defamation . . . [and] [l]ibel . . . is written defamation." (Internal quotation marks omitted.) *Mercer* v. *Cosley*, 110 Conn. App. 283, 297, 955 A.2d 550 (2008). "A distinction is recognized . . . between slander and libel. . . . Slander is actionable per se if it charges incompetence or dishonesty in office, or charges a professional person with general incompetence . . . . A statement is, however, not slanderous per se if [it] . . . charge[s] no more than specific acts, unless

those acts are so charged as to amount to an allegation of general incompetence or lack of integrity." (Citations omitted; internal quotation marks omitted.) *Savage* v. *Andoh*, Superior Court, judicial district of New Haven, Docket No. CV-07-5015657-S (February 6, 2013, *Fischer, J.*). See also *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 566-67, 72 A.2d 820 (1950) (defamation per se found where defendant falsely charged plaintiff with improper conduct and lack of integrity in performance of professional duties and purpose was to effectuate plaintiff's discharge).

Privilege

The defendant argues that the allegedly defamatory statements are protected by a qualified or conditional privilege. "A defendant may shield himself from liability for defamation by asserting the defense that the communication is protected by a qualified privilege. . . . When considering whether a qualified privilege protects a defendant in a defamation case, the court must resolve two inquiries. . . . The first is whether the privilege applies, which is a question of law . . . . The second is whether the applicable privilege nevertheless has been defeated through its abuse, which is a question fact." (Citations omitted.) *Gambardella* v. *Apple Health Care, Inc.*, 291 Conn. 620, 628, 969 A.2d 736 (2009).

A defendant must sufficiently prove five prerequisites to assert the defense of either conditional or qualified privilege applicable to false expression encompassing a matter of public concern or conditioned upon statements made in the course of official duties. *Miles* v. *Perry*, 11 Conn. App. 584, 594-95, 529 A.2d 199 (1987). "The essential elements are (1) an interest to be upheld, (2) a statement limited in its scope to this purpose, (3) good faith, (4) a proper occasion,

and (5) a publication in a proper manner to proper parties only.... Neither conditional privilege exists where the defamatory remarks are activated by malice, improper motive, or lack of good faith in making the statement." Id., 595. See *Bleich* v. *Ortiz*, 196 Conn. 498, 504, 493 A.2d 236 (1985) (claim of conditional privilege defeated if defendant acts with malice, including any improper or unjustifiable motive). Further, "a qualified privilege may be defeated by a showing of either actual malice . . . or malice in fact...." *Gambardella* v. *Apple Health Care, Inc.*, supra, 291 Conn. 620, 626.

"[T]he malice required to overcome a qualified privilege in defamation cases is malice in fact or actual malice." *Hopkins* v. *O'Connor*, 282 Conn. 821, 845, 925 A.2d 1030 (2007). "Actual malice requires that the statement, when made, be made with actual knowledge that it was false or with reckless disregard of whether it was false.... A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth.... Malice in fact is sufficiently shown by proof that the publications were made with improper and unjustifiable motives." (Citation omitted; internal quotation marks omitted.) Id., 846-47. Furthermore, "[a]lthough the ultimate determination of whether qualified immunity applies is ordinarily a question of law for the court, when . . . there are unresolved factual issues material to the applicability of the defense . . . resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) Id., 847.

If there are unresolved factual issues as to whether the defendant's statements were made with malice, then the resolution of such issues must be left to the jury. In the present case, the plaintiffs allege that the defamatory statements made by the defendant as alleged in counts two,

three, four and six were false and made with malice. The defendant argues that the alleged statements are protected by qualified or conditional privilege because the statements were made in the course of performing the defendant's official duties; they concern matters of public concern; and the actions and statements were not made with improper motive, bad faith, or malice. The defendant has not, however, offered any evidence to establish that each of the five required elements of the privilege applies. Therefore, the defendant has failed to show that there is no genuine issue of material fact that the alleged defamatory statements are protected by qualified or conditional privilege. Furthermore, to the extent that the defendant attempts to refute the allegations of malice with the argument that the statements are true or his opinion, those issues will be addressed separately with respect to each count discussed below.

A.

In count two, the plaintiffs allege the following: "In or about January 2014, Mr. Herbst asserted to a reporter from the Trumbull Times that AFB had undertaken major projects in the Town of Trumbull without properly pursuing permits or inspections." The article was published on January 16, 2014, and was entitled "Herbst launches investigation into AFB's work in Trumbull." See Pls.' Ex. 9. The defendant argues that there is no genuine issue of material fact that the plaintiffs cannot prove the defamatory statement contained in count two because no such statement exists. The plaintiffs counter that there is a genuine issue of material fact as to whether the statement is contained in the article published in the Trumbull Times.

"A claim of [defamation] must be pled with specificity, as the precise meaning and choice of words employed is a crucial factor in any evaluation of falsity. The allegations should set forth

facts . . . sufficient to apprise the defendant of the claim made against him . . . . [A] complaint for defamation must, on its face, specifically identify what allegedly defamatory statements were made, by whom, and to whom . . . ." (Internal quotation marks omitted.) *Chertkova* v. *Connecticut General Life Ins. Co.*, Superior Court, judicial district of New Britain, Docket No. CV-98-0486346-S (July 12, 2002, *Berger, J.*), aff'd, 76 Conn. App. 907, 822 A.2d 372 (2003).

In the present case, the defendant has met his burden of establishing that the plaintiffs cannot prove the allegations of count two. The plaintiffs allege that the defendant stated to a reporter at the Trumbull Times that the plaintiffs undertook major projects in Trumbull without the proper permits. The parties do not dispute that the article at issue is a Trumbull Times article, entitled "Herbst launches investigation into AFB's work in Trumbull," which states that the defendant ordered an investigation into school building permits and projects handled by the plaintiffs. Pls.' Ex. 9. In support of the plaintiffs' allegations in count two, they point to the following statements in the article: (1) "Herbst sent a memorandum to Fire Marshal Meghan Murphy and Building Official Graham Bisset on Wednesday, asking for an investigation into school building permits"; (2) "'There is a pattern here – whether it's bid waivers not being sought for snow removal or bid waivers for non-emergency projects,' Herbst told the Times"; and (3) "The first selection wrote in his letter to the Trumbull officials that he found it troubling Barbarotta did not get adequate permitting and inspection for the duration of the project. He argued that if the project is the first of its kind, that would seem to be all the more reason to make sure it's properly permitted and that inspections get done." See Pls.' Ex. 9; Def.'s Ex. F1. The statements referenced by the plaintiffs, however, expressly pertain to projects that the plaintiffs

did in Stamford, not Trumbull. The article is devoid of any other statements by the defendant that the plaintiffs undertook major projects in Trumbull without properly pursuing permits or inspections. Therefore, the defendant has met his burden of showing that there is no genuine issue of material fact that the plaintiffs cannot prove the defamatory statement contained in count two. Accordingly, the court grants the defendant's motion for summary judgment as to count two.

B.

The defendant argues that count three is barred by the absolute defense of truth. The plaintiffs counter that there is a genuine issue of material fact as to whether the statement is true or capable of defamatory meaning. "Truth is an absolute defense to an allegation of libel." *Mercer* v. *Cosley*, supra, 110 Conn. App. 301. "Where the main charge, or gist, of the libel is true, minor errors that do not change a reader's perception of the statement do not make the statement actionable. . . . The issue is whether the libel, as published, would have a different effect on the reader than the pleaded truth would have produced." (Citation omitted; internal quotation marks omitted.) *Strada* v. *Connecticut Newspapers, Inc.*, 193 Conn. 313, 322, 477 A.2d 1005 (1984).

In count three, the plaintiffs allege defamation per se for the following statement: "On or about January 16, 2014, Mr. Herbst, in an interview with a reporter from the Trumbull Times, cited the Audit Report and, in particular, its allegations that AFB acted improperly by failing to obtain a bid waiver for the emergent work of clearing roofs during the snow removal projects in 2011 and 2013." The plaintiffs allege that this factual assertion is false, that it attacks the

integrity of the plaintiffs' profession, has adversely affected their business, and that it was uttered with malice. The defendant claims that this statement is not defamatory because it is true.

In the present case, the parties do not dispute that the plaintiffs did not obtain a bid waiver for the emergent work of clearing the roofs during the snow removal projects in 2011 and 2013. Furthermore, both parties agree that the Trumbull Town Charter requires a bid waiver for services that cost over $10,000, indicating that a bid waiver was required for the snow removal projects. The parties disagree, however, as to whether the requirement of a bid waiver was waived for the pertinent snow removal projects, and whether the plaintiffs were responsible for obtaining a bid waiver. Thus, the issue turns on whether the statement that the plaintiffs acted "improperly" in not obtaining a bid waiver constitutes defamation.

Both parties have submitted testimony that multiple individuals could have obtained the bid waiver, including Barbarotta. See Def.'s Ex. R (affidavit of Sean O'Keefe, Business Administrator for the Trumbull Board of Education); Pls.' Ex. 2 (affidavit of Barbarotta); Pls.' Ex. 3 (deposition testimony of Ralph Iassagno, Facilities Manager and Plant Coordinator). The defendant did not present evidence that Barbarotta himself was solely responsible for obtaining the bid waiver for the projects, but rather, he relies on the fact that a bid waiver was required, Barbarotta was one of the people who could have been responsible for obtaining the bid waiver, and that it was not obtained. In response, the plaintiffs have provided evidence suggesting that the requirement of obtaining the bid waiver was waived for purposes of the relevant projects. Barbarotta stated that he believed that when the defendant told him to "do whatever it takes," he was indicating that a bid waiver was not necessary. Pls.' Ex. 2, p. 3. Iassagno also testified in

his deposition that he believed the bid waiver was not needed based on the defendant stating: "Let's do what it takes as long as it's done quickly and safely." Pls.' Ex. 3, p. 28. Where "libel, as published, would have a different effect on the reader than the pleaded truth would have produced," truth may not be an absolute defense. See *Strada* v. *Connecticut Newspapers, Inc.*, supra, 193 Conn. 322. Accordingly, although portions of the statement may be true, a question of fact exists as to whether the effect on the reader would be significantly different than what the complete truth would have produced. If Barbarotta was not the person required to obtain the bid waivers, then the statement that the plaintiffs acted *improperly* by not obtaining them would have a different effect on the reader than if these words had been omitted by insinuating that the plaintiffs should have, but did not, receive the bid waiver. Therefore, there is a genuine issue of material fact as to whether truth may be an absolute defense to this cause of action. Consequently, the court denies the defendant's motion for summary judgment as to count three.

C.

In count four, the plaintiffs allege defamation per se for an incident that occurred on or about April 18, 2015, where the defendant "asserted in statements to a reporter for the Connecticut Post that Mr. Barbarotta 'even used his friendship with the governor to promote his energy business to Newtown officials after the Sandy Hook Elementary school shooting.'" The plaintiffs allege that this factual assertion is false, that it attacks the integrity of the plaintiffs' profession, has adversely affected their business, and that it was uttered with malice. The defendant argues that the statement was true, and thus, not defamatory.

The parties have presented conflicting testimony as to the events that occurred with respect to promotion of the plaintiffs' business in Newtown. The defendant provides deposition testimony from the director of operations of the Newtown Board of Education, Gino Faiella, who was present in Newtown and who testified that Barbarotta said that he was sent there by the governor. See Def.'s Ex. T, pp. 5, 20. Faiella further testified that Barbarotta handed him and others a pamphlet that promoted Conveo Energy while they were both at Newtown. See Def.'s Ex. T, pp. 42-45. Faiella also stated that he saw a stack of the pamphlets on Barbarotta's desk in the main office area, and that he had heard Barbarotta discussing Conveo Energy and energy saving with the Superintendent of Schools, Mr. Agostine. Def.'s Ex. T, p. 45.

The plaintiffs have offered significantly different evidence on this matter. Barbarotta states in his affidavit that, after the tragedy in Newtown, he arrived there at the request of Bud Salemi, the Deputy Commissioner of the Bureau of School Construction, and that he was there to assist in relocating the students of Sandy Hook. See Pls.' Ex. 2. This is corroborated in Salemi's affidavit, in which he avers that he reached out to Barbarotta and asked him about assisting in Newtown. See Pls.' Ex. 2. Barbarotta states that he was not in Newtown because of the governor, and that he did not tell anyone that he was. See. Pls.' Ex. 12. Barbarotta further avers that while in Newtown he assisted in any way that he could, but that he did bring work for his other two businesses to the office, including Conveo Energy. He states that at one point, one of the other individuals in Newtown asked Barbarotta what he did for work and he told them that his other company, Conveo Energy, worked in energy savings. Barbarotta asserts that he was not at Sandy Hook to promote his company in any way. See Pls.' Ex. 12.

The truth of the statement, whether Barbarotta used his relationship with the governor to promote his business while in Newtown or whether Barbarotta promoted Conveo Energy at all during his time in Newtown, weighs directly on whether the defendant's defense of truth will prevail. There are conflicting statements by multiple witnesses, however, as to the truth of the allegedly defamatory statement. "[I]f there are inconsistencies in a witness' testimony, [i]t is the exclusive province of the trier of fact to weigh [the] conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony." (Internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017). Therefore, the trier of fact in this case must determine the truth of the statements of these witnesses. Consequently, there is a genuine issue of material fact as to the truth of the statement, and therefore, the court denies the defendant's motion for summary judgment as to count four.

D.

In count six, the plaintiffs allege that the statements that the plaintiffs "took the taxpayers and the town of Trumbull for a ride for quite some time" and that the town had "spent millions to have [Barbarotta] remove snow off buildings, the $66 million we spent on a high school renovation that is fundamentally flawed, and the millions we paid him to remove asbestos from buildings that still have it" are defamatory.

The defendant argues that the statements that the town "spent millions to have [Barbarotta] remove snow off buildings, the $66 million we spent on a high school renovation . . . and the millions we paid him to remove asbestos from buildings that still have it" are true, and

thus, not defamatory. The defendant further argues that the statements that the plaintiffs "took the taxpayers and the town of Trumbull for a ride for quite some time" and that the buildings were "fundamentally flawed" were his opinions, and therefore, not defamatory. The plaintiffs counter that the statements are capable of defamatory meaning.

"To be actionable [for defamation], the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion." *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 795, 734 A.2d 112 (1999). "A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known. . . . In a libel action, such statements of fact usually concern a person's conduct or character. . . . An opinion, on the other hand, is a personal comment about another's conduct, qualifications or character that has some basis in fact." (Citations omitted; emphasis omitted.) *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 111, 448 A.2d 1317 (1982).

"This distinction between fact and opinion cannot be made in a vacuum, however, for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated. . . . Thus, while this distinction may be somewhat nebulous . . . [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 111-12. "Some of the factors used to make this determination are:

(1) its truth or falsity; (2) the language used; and (3) its context." *Murray* v. *Schlosser*, 41 Conn. Supp. 362, 365, 574 A.2d 1339 (1990).

"[I]f the alleged defamatory words could not reasonably be considered defamatory in any sense, the matter becomes an issue of law for the court." *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 605, 612, 116 A.2d 440 (1955). "All of the circumstances connected with the publication of defamatory charges should be considered in ascertaining whether a publication was actionable per se. The words used, however, must be accorded their common and ordinary meaning, without enlargement by innuendo." *Miles* v. *Perry*, supra, 11 Conn. App. 602-603. "When such a determination is made, the words that are claimed to be defamatory are given their natural and ordinary meaning and are taken as reasonable persons would understand them. . . . Moreover, the words must be viewed in the context of the entire editorial." (Citation omitted.) *Dow* v. *New Haven Independent, Inc.*, 41 Conn. Supp. 31, 36, 549 A.2d 683 (1987).

At Barbarotta's deposition, he did not disagree that millions of dollars were spent to remove snow off of the buildings, that $66 million was spent on the high school renovation project, or that millions of dollars were paid to remove asbestos. See Def.'s Ex. F. In fact, the plaintiffs do not argue the truth of any of the above statements. Further, Barbarotta stated in his deposition that the statement that the plaintiffs "took the taxpayers and the town of Trumbull for a ride for quite some time" was the opinion of the defendant. See Def.'s Ex. F. Finally, the statement that the renovations done by the plaintiffs were "fundamentally flawed" could only be considered an opinion of the defendant. Therefore, the court next considers whether the statements, although true or opinions, are capable of defamatory meaning.

In determining whether a statement is capable of defamatory meaning the court must look to "whether the challenged statements could reasonably be understood to imply [the alleged defamatory meaning] . . . ." (Internal quotation marks omitted.) *Stevens* v. *Helming*, Superior Court, judicial district of New Haven, Docket No. CV-11-6019393-S (June 23, 2014, *Wilson, J.*), aff'd, 163 Conn. App. 241, 135 A.3d 728 (2016). Although the plaintiffs argue that the statements are capable of defamatory meaning in that they can be interpreted "as accusing the [p]laintiffs of stealing taxpayer dollars without providing anything of value in exchange"; Pls.' Mem. Opp. Mot. Summ. J., p. 34; there is no basis to support this claim. When according words their common and ordinary meaning, without enlargement by innuendo, the statements are not reasonably capable of the plaintiffs' interpretation. Accordingly, the defendant has met his burden of showing that there is no genuine issue of material fact that the statements were either true or opinions of the defendant, and thus not defamatory in nature as a matter of law. Therefore, there is no genuine issue of material fact that the plaintiffs cannot prove the elements of a claim for defamation per se with respect to count six. Consequently, the court grants the defendant's motion for summary judgment as to that count.

CONCLUSION

For the foregoing reasons, the court grants the defendant's motion for summary judgment as to counts one, two, and six. The court denies the defendant's motion for summary judgment as to counts three and four.

BELLIS, J.

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